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No. 92-357

IN THE

Supreme Court of the United States

October Term, 1992

RUTH O. SHAW, et al.,

Appellants,

v.

WILLIAM BARR, et al.,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina Raleigh Division

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BRIEF AMICUS CURIAE OF THE AMERICAN JEWISH CONGRESS IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

(1) Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own.

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INTEREST OF THE *AMICUS*

The American Jewish Congress ("AJCongress") is an organization of American Jews founded in 1918 to protect the political, civil and economic rights of American Jews and all Americans. It believes that the rights of Jews are not secure unless the rights of all Americans are secure.

To this end, the AJCongress has long supported legislation, including the Voting Rights Act, to enlarge the franchise so that all Americans may take an active and equal role in the governance of our democratic society. AJCongress has likewise initiated or supported litigation challenging all manner of racially exclusionary electoral devices, including poll taxes, literacy tests and intentionally segregated districts.

In supporting these efforts to achieve electoral equality, AJCongress thought that it was urging color-blind elections, where government above all would not insist on the relevance of racial matters.

Given the secret ballot, government cannot prevent people from voting on a racial, religious, sexual, or ethnic basis. These are essential elements of who Americans are. It is therefore understandable, if not necessarily admirable, that such voting takes place. But under our constitutional system, it is one thing to tolerate such voting. It is quite another for government to design districts to reinforce racial, ethnic, religious or sexual voting patterns, and to make these factors the central organizing features of political affairs.

The AJCongress has steadfastly opposed the effort to convert the principle of full, fair, and equal participation in the electoral process into a system of ethnic, religious, or racial fiefdoms. As this case and other cases before the Court this Term illustrate, that is no longer an abstract fear, but a real threat to the health of our pluralistic democracy. We file this brief in order to help clarify the line between banning discrimination in the electoral process and ensconcing race at the heart of that process.

This brief is filed with the consent of the parties. Letters of consent are on file with the Clerk.

SUMMARY OF ARGUMENT

This Court has posed the question of whether a state redistricting plan, drafted to remove an objection by the United States Department of Justice under the Voting Rights Act to its districting plan in wholly immune from suit, even if the State plan departs substantially from the plan proposed by the Department.

The constitutional questions lurking in this case are substantial, going as they do to the limits on congressional power to mandate that race be a permanent feature of the electoral system. While some decisions of the Court suggest that Congress enjoys broad powers in this area, and may empower or require others to implement remedial racial criteria, other decisions suggest substantial limits on Congress' authority.

Those questions merit the Court's attention, but they need not be addressed here. The predicate for answering those questions is that the Voting Rights Act was violated by the State of North Carolina when it adopted its first districting plan. However, the Department of Justice in this case interpreted the Voting Rights Act to require that a majority-minority district be established merely because it was possible to do so. The Act, however, specifically repudiates such an interpretation, which is nothing less than a claim for proportional representation.

Perhaps more lies behind the Department of Justice's letter than appears. But the court below held that appellants could not prove any conceivable set of facts which would entitle it to relief. Unless the Court is prepared to

hold that once the Voting Rights Act enters the case, no constitutional restriction on the use of race under the Voting Rights Act (and, indeed, that the Voting Rights Act poses no such restrictions), the dismissal of the complaint for failure to state a claim cannot be sustained. Accordingly, this case should be remanded for further proceedings.

ARGUMENT

The issue this Court has directed be briefed and argued is the extent to which a state's purported compliance with the Voting Rights Act at the behest of the Attorney General immunizes its redistricting plan from attack as an unconstitutional racial gerrymander. That is no doubt a significant question, calling into question the extent to which *United Jewish Organizations of*

Williamsburgh v. *Carey*, 430 U.S. 144 (1977), cited with approval in *Metro Broadcasting, Inc.* v. *FCC*, 110 S.Ct. 2997, 3019 (1990), remains consistent with some of the Court's other pronouncements on 'remedial' uses of race, *e.g.*, *City of Richmond* v. *J.A. Croson, Inc.*, 488 U.S. 469 (1989), and the extent, if any, to which a general federal command to use race as a remedial device immunizes discretionary state action under that authority from constitutional attack. We have no occasion to address those questions here, for we believe that the question the Court directed be briefed and argued makes an assumption about the action of the Justice Department which is without basis in this case.

The question assumes that the Attorney General acted pursuant to the Voting Rights Act in interposing an

objection to North Carolina's original districting plan. Whatever else may be said about the Attorney General's action, and North Carolina's response, it surely cannot be said to have been taken in compliance with the requirements of the Voting Rights Act.

The Attorney General's objection in this case rests on the first redistricting plan's "clear violation of Section 2 of the Act" [55a], not on a § 5 regression claim. *Beer* v. *United States*, 425 U.S. 130 (1976). The cases cited by the Attorney General in his letter of objection to describe the substantive scope of the Voting Rights Act are § 2 cases, not ones arising under § 5 of the Act. The viability of the Attorney General's objection depends, then, on the correct application of § 2 principles.

Section 2 is not easy to apply. But surely it is clear that a violation of § 2 is not made out merely by an absence of specific relation between the number of minorities and the number of persons belonging to that minority elected. The Act says so in unmistakably clear terms: "[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." Similarly, the Voting Rights Act does not require that districts be drawn solely in order to create minority districts just because it is possible to do so.[1]

Largely to give meaning to those sections, as well as to the Act's protection for minority political power,

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1. A state might want to adopt such a policy, which constitutionality could then be tested. But that is not the case, nor is it the question that this Court has asked be briefed.

Thornburg v. *Gingles*, 478 U.S. 30 (1980), this Court's only opinion to date on the substantive reach of § 2, mandated a complex inquiry into the political realities in a jurisdiction as a prerequisite for establishing existence of a § 2 violation.

Relying heavily on Senate Report 97-417, 97th Cong. 2d Sess., 1982 U.S. Code, Cong. & Admin. News (1982) p.28, the Court adopted a totality of the circumstances test, *see* 478 U.S. at 37, 48. Under *Gingles*, the minority challenging a districting decision must prove[2] at the

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2. When a § 2 claim is incorporated into a § 5 objection there is a significant shift in the burden of proof. Under § 5, the burden of proof is on the jurisdiction to prove the absence of prohibited adverse impact on minorities. Yet an important part of this Court's construction of § 2 -- and of the Senate Committee's explanation of why the 1982 Amendments did not create a system of proportional representation -- is that the burden of proving all the elements of a § 2 violation rested with those challenging a government action as discriminatory.

threshold that a minority group is politically cohesive, that it is sufficiently large and geographically compact to constitute a majority, and that racially polarized voting exists in the jurisdiction. After determining that these threshold requirements are met, the courts must consider the remaining factors enumerated in the Senate Report.

Leaving aside the extent to which the *Gingles* criteria are applicable to single-member districts (an issue we have adverted to in our *amicus* brief in *Wetherell* v. *DeGrandy*, 92-519 (Oct. Term 1992), these three threshold criteria, to say nothing of the more complex eight-point inquiry required by the authoritative Senate Report, were not applied by the Attorney General in this case.

The findings of the Attorney General in regard to the United States House of Representatives are as follows:

> As in the House and Senate plans, however, the proposed configuration of the district boundary lines in the south-central to southeastern part of the state appear to minimize minority voting strength given the significant minority population in this area of the state. In general, it appears that the state chose not to give effect to black and Native American voting strength in this area, even though it seems that boundary lines that were no more irregular than found elsewhere in the proposed plan could have been drawn to recognize such minority concentration in this part of the state. . . .
>
> We also note that the state was well aware of the significant interest on the part of the minority community in creating a second majority-minority congressional district in North Carolina. For the south-central to southeast area, there were several plans drawn providing for a second majority-minority congressional district, including at least one alternative presented to the legislature. No alternative

plan providing for a second majority-minority congressional district was presented by the state to the public for comment. Nonetheless, significant support for such an alternative has been expressed by the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU). These alternatives, and other variations identified in our analysis, appear to provide the minority community with an opportunity to elect a second member of congress of their choice to office, but despite this fact, such configuration for a second majority-minority congressional district was dismissed for what appears to be pretextual reasons. Indeed, some commentors have alleged that the state's decision to place the concentrations of minority voters in the southern part of the state into white majority districts attempts to ensure the election of white incumbents while minimizing minority electoral strength. Such submergence will have the expected result of "minimiz[ing] or cancel[ing] out the voting strength of [black and Native American minority voters." . . . Although invited to do so, the state has yet to provide convincing evidence to the contrary. [citations omitted]

Perhaps the underlying facts support a § 2 (or even a § 5) claim. But for all that appears in the Attorney General's letter of objection, North Carolina did nothing worse than refuse to draw a possible minority district. The letter does not assert that these minorities were politically cohesive or shared anything in common beyond the color of their skin.

Nor was there any finding that the original configuration left minorities unable to elect a representative of their choice, unless, of course, a representative of one's choice is defined solely in terms of the racial identity of the successful candidate, a position which is untenable in light of its rejection by Congress in the last sentence of 42 U.S.C. 1973(b) and by this Court in *Thornburg* v. *Gingles*, *supra*, 478 U.S. at 62 (1986).

This case comes to this Court on appeal from a successful motion to dismiss. F.R. Civ. P. 12(b)(6). Translated into constitutional terms, the effect of that dismissal is that no matter what the facts, no matter what the deficiencies in the action of the United States Department of Justice in administering the Act, no matter how far a state departs from a suggested remedy proposed by the Department of Justice, no matter how bizarre the resulting District, no matter what its impact on whites within the majority-minority district, no matter how distinct those whites are from other whites in the jurisdiction, no matter how long after prior electoral and other forms of discrimination have been eradicated racially-based districting takes place, no constitutional or statutory claim can be stated. This cannot be the law, or more

precisely, if it is the law, it is this Court which should say so directly and plainly.

The construction of the Act apparently adopted by the Department of Justice poses substantial constitutional questions. *United Jewish Organizations of Williamsburgh* plainly sanctioned some remedial use of race in the districting process. That decision was rendered under a section of the Voting Rights Act which was temporary, and not, as § 2 now is, a permanent feature of the law.

This Court has frequently held that the remedial use of race cannot be authorized in perpetuity, as § 2 does. *City of Richmond* v. *J.A. Croson, supra*. It is true that pursuant to Amendment XIV, § 5, the Court has allowed great leeway for congressionally authorized uses of race to remedy discrimination, *Fullilove*

v. *Klutznick*, 448 U.S. 448 (1980); *Metro Broadcasting, Inc.* v. *FCC, supra*, and has suggested that the holding in *United Jewish Organizations of Williamsburgh* is consistent with those holdings. *Metro Broadcasting, Inc.* v. *FCC, supra*.

However, even in those cases this Court was careful to hold that the use of race cannot be justified indefinitely as a remedial device, nor can racial criteria be used to maintain some sort of permanent racial balance. *Metro Broadcasting, Inc.* v. *FCC, supra*.

Moreover, in *United Jewish Organizations of Williamsburgh* this Court emphasized that it was considering a gerrymandered district which was geographically cohesive, that more or less accorded with social and political realities already existing on the ground. The challenged district in this case has

none of these saving graces. There is no way to explain the challenged district but as a means to provide a racial result.

How to reconcile these conflicting constitutional holdings is not at all obvious, and we do not now suggest such a reconciliation. We recognize the importance of the Voting Rights Act, the persistence of subtle (and not so subtle) efforts to disenfranchise or dilute the political power of minorities, and the great power accorded Congress to address the lingering effects of past discrimination.

But we also know that the single-minded focus on racial districting has a deleterious impact on the body politic, and one inconsistent with government's constitutional obligation. That is the gist of this Court's holding invalidating a Louisiana statute which required

candidates to be identified on the ballot by race. *Anderson* v. *Martin*, 375 U.S. 399, 462 (1964) ("The vice lies . . . in placing the power of the State behind a racial classification that induces racial prejudice in the polls.")

Whatever may be the resolution of a direct constitutional challenge to the line that Congress has drawn in balancing the claim for minority empowerment with the ultimate goal of purging race from the ballot box, it surely is not the case that serious and substantial allegations that a state has upset this delicate balance and gone too far in tilting toward a system of racial gerrymanders -- where a district's sole unifying fact is race -- cannot state a claim under either the Act or the Constitution. In view of the long-standing and well-settled preference for deciding statutory issues prior to

constitutional claims, this case should be remanded for consideration of whether the Voting Rights Act itself required more of North Carolina than its first plan provided.

CONCLUSION

To sustain a dismissal for failure to state a claim,

> the accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. *Gibson*, 355 U.S. 41, 45-46 (1955). Accord *Neitzke* v. *Williams*, 109 S.Ct. 1827, 1832 (1989). As we have indicated, that high standard was not met here.

Accordingly, the judgment should be reversed, and the case remanded for a determination of whether the first

districting plan violated § 2, and then, and only if necessary, whether the remedy adopted exceeded the limits imposed by the Constitution.

Respectfully submitted

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